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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 632.

NEW ORLEANS SHIPWRECKING CORPORATION, *Petitioner*,

vs.

WILLMIAM W. SMITH, GRENVILLE MELLON, RICHARD PARKHURST, RAYMOND McKEOUGH, and JOSEPH K. CARSON, JR., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, a Louisiana corporation, respectfully shows:

STATEMENT OF THE CASE.

On January 30, 1948, petitioner brought its complaint in the United States District Court for the District of Columbia praying that respondents, as duly qualified mem-

bers of the United States Maritime Commission, be enjoined and restrained from carrying into effect a purported illegal and unauthorized cancellation of a certain award and sale to petitioner of certain surplus LST ships, from readvertising the ships for sale, reselling or delivering them and for general relief. (R. 2-6)

A temporary restraining order was granted upon the filing of the complaint. Petitioner duly moved for a temporary injunction. Respondents moved to dismiss the complaint or, in the alternative for summary judgment. (R. 7). On February 13, 1948, the District Court after oral argument, denied all motions, and recorded an opinion later followed by the trial court. (R. 9-11)

Respondents then answered, admitting that on September 17, 1947 and on October 29, 1947, the United States Maritime Commission published invitations to bid, offering numerous vessels for sale; that petitioner submitted bids on certain vessels together with an appropriate bond as required by the Commission and that upon the opening of the bids, petitioner was found to have been the highest bidder on nineteen of the vessels. The answer also admitted that on January 22, 1948, The Maritime Commission met, voted and decided that awards be made to petitioner on fifteen of the nineteen vessels, saying that as to four vessels the bids were rejected. (R. 8)

Respondents also admitted that, as petitioner alleged in Paragraph 12 of the complaint, on Friday, January 23, 1948, respondents met and *attempted to reconsider* the decision awarding the plaintiff the ships as aforesaid and also *attempted to reverse the action* of January 22, 1948, relative to the sale of the ships to the plaintiff, but further said that respondents *did rescind* their action awarding the sale of such ships to petitioner. (Emphasis supplied) (R. 8)

On March 15, 1948, the parties stipulated that the bids for the four ships were rejected at the time the Commission awarded or approved the sale of 15 other vessels as stated in the complaint, signing the stipulation at a pre-

trial hearing. The court, at the pre-trial hearing also made a statement of the law, adopting the oral opinion of the court at the hearing of the motions above referred to. The minutes of the meetings of the Maritime Commission of January 22 and January 23, 1948, were stipulated into evidence. (R. 12, 13).

After a hearing on the merits, and after considering the pleadings, evidence and argument of counsel, the trial court rendered an opinion incorporating the law as stated in the opinions of the judges at the hearings of the motions and at pre-trial procedure, and the same was entered on March 22, 1948. (R. 13, 14) Thereafter, the trial court filed its findings of fact and conclusions of law and entered judgment ordering the complaint dismissed on April 13, 1948. (R. 14-17).

Notice of appeal was filed on May 12, 1948 and bond was duly posted the following day.

The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the lower court, rendering an opinion with one judge dissenting on December 13, 1948. (R. 80-82)

THE FACTS.

As may be seen from the review of the allegations of the complaint and the admissions in the answer, above referred to, this cause centers upon the validity or invalidity of the award made by the United States Maritime Commission on January 22, 1948, and upon the validity or invalidity of the action of the United States Maritime Commission on January 23, 1948, purporting to rescind that award.

At the hearing the following facts developed:

1. The two invitations to bid were identical, save for the identity of the vessels offered for sale, the dates or issue and the dates for the opening of the bids. Both invitations offered the vessels for sale and prescribed terms and conditions, requirements and restrictions for the bidding which

were identical. The terms and conditions of sale were captioned: "Information and Instructions to Bidders" and comprise twelve printed pages of the record. (Plaintiff's Exhibit 1, R. 52-64).

2. Important and essential terms and conditions for bidding included the following:

a. Bids were required to be submitted on the form provided by the Maritime Commission and attached to the invitation to bid. (Plaintiff's Exhibit 1; R. 54; R. 67, 68)

b. Bids were required to be accompanied with either a guaranty of 25 per cent of the amount bid, (certified or cashier's check) or by a bond satisfactory to the Commission, to insure compliance with terms of the bid. (Plaintiff's Exhibit 1; R. 54)

c. Bids could not be withdrawn after the time fixed for opening. (Plaintiff's Exhibit 1; R. 56)

d. The Commission reserved the right to reject any and all bids. (Plaintiff's Exhibit 1; R. 56)

3. The form for bidding provided by the Commission (see 2 a above) required filling in only of blanks identifying the bidder and the invitation, the vessels and the respective prices bid, and the signature of the bidder. (R. 67, 68).

4. Petitioner duly submitted bids, pursuant to the invitations, (R. 19), and furnished bonds in the amount of $1,073,000.00 (R. 20). Respondents by their attorney, in reply to a question from the trial court, admitted there was no question raised as to the insufficiency of the bond. (R. 21).

5. Upon accepting the bids on January 22, 1948, the Commission issued the following direction:

> "The proper officers of the Commission were authorized and directed to take any and all actions necessary to carry the action of the Commission as above set forth fully into effect." (R. 75). (Minutes of Commission meeting of January 22, 1948.)

6. Though it was normally the function of the Secretary of the Commission to dispatch telegrams of notification to successful bidders, the Secretary in this instance took no such action. (R. 34). *He* decided not to act, because an individual Commissioner suggested to him that no formal notice be sent, since that Commissioner intended to seek a reconsideration of the action. This suggestion occurred after the Commission meeting had been adjourned. (R. 34, 35).

7. Between the time of the adjournment of the meeting of January 22, 1948 and before the meeting of the Commission on January 23, 1948, one Nathan Siegel, an agent for petitioner, having heard that the awards had been made, made inquiries if the Commission's Large Vessels Sales Division and of the Secretary whether this was so. At the Large Vessel Sales Division, on January 22, 1948, Siegel testified, he learned that petitioner had been awarded the vessels on which it was high bidder. At the Secretary's office, on the same date, having told the Secretary of the information he got at the Division of Large Vessel Sales, he inquired if the awards which had been held up so long had been made and was told by the Secretary: "Yes, they have been made and I am glad the matter has been finally disposed of." (R. 26, 27). On the morning of January 23, 1948, Siegel again visited the offices of the Division of Large Vessel Sales, asked if the telegram of notification to petitioner had been written and was told by a stenographer: "I am writing it now." (R. 27). The above is based upon testimony of Siegel.

As to the truth of the information, no attempt was made to deny the same at the trial—that is that the awards had been made as learned by Siegel at the time (except for the four vessels on which petitioner was high bidder and which, according to the answer, were not awarded) and officials and employees of the maritime Commission were vague in their testimony respecting matters about which Siegel was definite. Thus, a Mr. Carter, in the Division of Large

Vessel Sales did not recall whether he talked to Siegel "on January 22 or January 31" adding that "he and five hundred others are in and out all day long", but admitting that it was within the range of possibilities that he had talked to Siegel on January 22. Carter did not recall discussing the Commission action with him then and denied that he told Siegel petitioner had been awarded certain bids. (R. 44). Petitioner here concedes that the Secretary and all other officials to whom Siegel testified he talked about the bids declared they did not know of Siegel's connection with petitioner as an agent at the time.

Siegel, after his visit to the Division of Large Vessel Sales on the morning of January 23, sent a telegram to petitioner informing petitioner that he had learned the awards had been made to petitioner. (R. 27, 73).

8. The trial court took judicial notice of a regulation published in the Federal Register of September 11, 1946, at the request of respondents to show that the "Office of the Secretary is responsible for appropriate notification of Commission actions." (R. 49, 50). The same regulation provides that inquiries concerning awards of LST vessels to be sold for scrapping or otherwise be directed to the Division of Large Vessel Sales, and that the sales are made by Commission action on recommendations of this division. (11 F. R. 177A-594). This second excerpt was not brought specifically to the attention of the trial court. (It was to the Court of Appeals).

9. On January 23, 1948, at a special meeting of the Maritime Commission which commenced at 3:30 p.m., Commissioner Mellen moved for reconsideration of the action of January 22, with respect to LST's pointing out that the bids in many cases were as much as $10,000 below other bids for LST's and that offers had been made for purchase of LST's for use as non-self propelled barges. The Commission voted to reconsider. After further discussion, by the "yea" votes of three Commissioners, the Commission

"rescinded" its action of January 22, 1948. (Proceedings of the United States Maritime Commission, minutes of special meeting of January 23, 1948; R. 77).

OPINIONS BELOW.

While the opinions below are not yet reported in book form they are in the record as designated.

Trial Court: Oral but recorded opinion on motions, February 13, 1948, (R. 9) by District Judge Holtzoff; Memorandum at pre-trial hearing March 15, 1948, (R. 12) by District Judge Schweinhaut; opinion of trial judge, March 22, 1948, (R. 13) by District Judge Bailey.

The case was decided in the trial court on the issue as to whether the action of the Commission of January 22, 1943, resulted in the consummation of a binding agreement, and that issue was resolved by a finding that it did not so result because the Secretary of the Commission was the only authorized officer of the Commission who could notify petitioner of the acceptance of the bid, and who did not "knowingly" do so, so that the essential requirement of a bilateral contract that manifestation of assent or communication of acceptance of the proposal or offer was lacking. (R. 13-17).

Court of Appeals: The Court limited its consideration of the case to the sole point as to whether a contract existed by reason of the Commission action of January 22, 1948, in the face of the failure of the Secretary of the Commission to send a notification of acceptance, and affirmed the judgment on this ground, ignoring in its opinion the points and authorities on other grounds presented by petitioner (which will be referred to hereinafter). (R. 80, 81). The Court of Appeals entered judgment on the same day as the opinion issued, December 13, 1948. (R. 82).

PETITIONER'S CONTENTIONS BELOW.

In the Court of Appeals, petitioner urged the following points:

1. Notification by the Secretary of the Commission was a mere procedural matter and not a substantive element of contract because the contract was made when the Commission accepted the high bids of the petitioner and entered its action in records available for public inspection.

2. The published procedure of the Maritime Commission directed the public, when making inquiries concerning the award of bids for LST's to the Division of Large Vessel Sales and therefore the requirement of the trial court that notice be obtained from the Secretary of the Commission, and only from him, was erroneous. Petitioner urged in support of this contention the provisions of Section 3 of the Administrative Procedure Act of 1946, (60 Stat. 238; Title 5, U. S. Code, Sec. 1002), wherein Congress provided that no person should be required to adopt a procedure to obtain information from a government agency other than the procedure published by the agency, pursuant to that law.

3. Petitioner contended that equity forbade the validation of the decision of the Commission to rescind its awards as a decision repugnant to equity and fair dealing.

4. Petitioner relied upon the doctrine espoused by this Court in *United States* vs. *Purcelle Envelope Co.* (249 U. S. 313), and the requirements governing competitive bidding and consummation of contracts with the United States as set forth therein. On the strength of the *Purcelle* case, petitioner contended that the time of deliberation and discretion ended for the Maritime Commission when it availed itself of the reserved alter-

nate to accept—and not reject—the bids of the petitioner on January 22, 1948, and entered its decision in official records, thereby consummating a contract which could not be arbitrarily rescinded, or set aside in the hope that greater profit would result from the repudiation of its officially recorded acceptance and obligation.

5. Petitioner also contended that the requirements of the Administrative Procedure Act of 1946 (*supra*), (whereby Congress directed government agencies to make public or make available for public inspection the records of official action) resulted in constituting the Commission's acceptance of petitioner's offers an open and overt manifestation of assent, which could not later be denied, thus making it unnecessary for the completion of the contract that a formal communication of acceptance be made to petitioner.

JURISDICTION.

Jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Sec. 1254, as revised, codified and enacted into law by the act of June 25, 1948. (Public Law 773, 80th Congress, Second Session; Judiciary and Judicial Procedure.)

QUESTIONS INVOLVED.

1.

Whether the decision of the Court of Appeals contravenes and ignores the doctrine on competitive bidding and consummation of contracts enunciated by this Court in *United States* vs. *Purcelle Envelope Co.* (249 U. S. 313).

2.

Whether the direction of the Maritime Commission that its proper officers carry an award fully into effect evidenced the intent and was an attempt of the Commission

to notify petitioner of its acceptance of bids by the petitioner, constituting the manifestation of assent necessary to consummate a valid and binding contract.

3.

Whether official entry of the award in Commission records was notice to the world in general, which would include petitioner in particular, of the acceptance of petitioner's bids, in view of the provisions concerning public information in the Administrative Procedure Act of 1946. (Title 5, U. S. Code, Sections 1001 and 1002; 60 Stat. 238).

4.

Whether rescission of an award made after competitive bidding on the ground that repudiation will produce a better bargain can be countenanced by equity.

5.

Whether the Secretary of the Commission was "the only officer authorized to give notice" of awards, in view of the publication by the Commission in the Federal Register, pursuant to the Administrative Procedure Act of 1946, of a procedure directing inquiries as to awards eleswhere.

6.

Whether the provision of Section 3(a) of the Administrative Procedure Act of 1946 that no person shall be required to resort to procedure not published as required therein applies to the instant case.

7.

Whether the decision of the Court of Appeals is erroneous on its face, in this, that the decision first accepts as a fact that the Martime Commission directed its proper officers to carry its action of accepting petitioner's bids and

making certain awards fully into effect, and then decides "there is no evidence that the Commission . . . did anything that was or appeared to be intended as notice . . . of the Commission's decision to accept some of its (petitioner's) offers." (Parenthetical matter supplied).

REASONS FOR GRANTING THIS WRIT.

1. The Court of Appeals has decided a question of governmental responsibility in competitive bidding in a way that is in conflict with the decision of the United States Supreme Court on such competitive bidding in *United States* vs. *Purcelle Envelope Co.* (249 U. S. 313). (Rule 38, 5 (b).)

2. The United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance involving the rights given the public by Congress in the Administrative Procedure Act with respect to information concerning actions of government agencies and procedure to obtain information as to the same. (Rule 38, 5(c)).

3. The importance of competitive bidding for contracts with the government, and the procedure surrounding the same, bespeaks a consideration of this case in the interest of co-relating the *Purcelle* case doctrine with provisions of the Administrative Procedure Act above cited.

4. The rights of the public to information under Section 3 of the Administrative Procedure Act present a question in this case which has not but should be settled by this Court. (Rule 38, 5(b)).

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a writ of certiorari issue under seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that Court to certify and sent to this

Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the District of Columbia Circuit had in the case numbered and entitled on its docket, No. 9896, *New Orleans Shipwrecking Corporation, appellant* vs. *W. W. Smith, et al., appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that judgment herein of said United States Court of Appeals for the District of Columbia Circuit be reversed by the Court and for such further relief as to this Court may seem proper.

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IN THE

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OCTOBER TERM, 1948.

No. .....

NEW ORLEANS SHIPWRECKING CORPORATION, *Petitioner,*

vs.

W. W. SMITH, *et al., Respondents.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

The case is stated in the petition, as are references to the opinions of the courts below, and the same are hereby incorporated herein by reference and prayed to be read and considered a part hereof.

SUMMARY OF ARGUMENT.

I.

Certiorari should issue to correct the judgment of the United States Court of Appeals for the District of Columbia Circuit in a case which should have been decided in favor of petitioner upon the authority of *United States* v. *Purcelle Envelope Co.* (249 U. S. 313).

II.

Certiorari should issue to settle the question as to whether during the process of competitive bidding an officially recorded acceptance of bids by the Maritime Commission and simultaneous direction by the Commission to its proper officers to carry the action of acceptance into effect consummated a valid and binding agreement.

III.

Certiorari should issue to settle the question as to whether entry of an award in official records of a government agency comprises, in and of itself, notice of the award made, in the light of the provisions of Section 3 of the Administrative Procedure Act of 1946, with respect to public information and public records. (60 Stat. 238; Title 5, U. S. Code, Sections 1001, 1002)

IV.

Certiorari should issue to settle the question as to whether the belief that greater gain would result from repudiating an award to the highest bidder after competitive bidding for the purchase of surplus government property is a reason cognizable in equity for cancellation of the award.

V.

Certiorari should issue to settle the question as to whether evidence as to exclusive authority in the Secretary of the Maritime Commission to notify successful bidders of awards may prevail over procedure published in the Federal Register (11 FR 177A-594) pursuant to the provisions of Section 3 of the Administrative Procedure Act of 1946 (*supra*), when the published procedure specifically directed inquiries as to awards of LST vessels elsewhere.

VI.

Certiorari should issue to settle the question as to whether, in view of the specific requirement of the Administrative Procedure Act of 1946, Section 3(a) respondents were positively precluded from insisting that petitioner might only obtain notice of award of sale of LST vessels from the Secretary of the Commission when its published procedure directed inquiries as to such specific awards to the Large Vessel Sales Division of the Commission.

VII.

Certiorari should issue to settle the question of whether a government agency, once having given a direction to its officer, can avail itself of an admitted refusal of that officer to proceed in accordance with the direction, to rescind an award which would have been even formally and technically irrevocable had the officer done what he was directed to do.

VIII.

Certiorari should issue to settle the question of whether the decision of the Court of Appeals is self-contradictory.

ARGUMENT.

I.

In *United States* vs. *Purcelle Envelope Co.* the basic question was whether the Postmaster General could rescind an award previously made pursuant to competitive bidding and entered in official records, on the ground that the formal contract had not been executed and that the bond of the successful bidder had not been approved. (249 U. S. 313).

The basic question in this case is whether the U. S. Maritime Commission could rescind an award previously made and entered in official records, based upon a bid secured by a $1,000,000 bond, on the ground that the secretary of the Maritime Commission had not "knowingly" given the successful bidder or its agent notice of the award.

In the *Purcelle Envelope Co.* case, this Court said: (249 U. S. 318)

"In the present case it is insisted . . . that he (the Postmaster General) has discretion and when exercised it is paramount, his action being 'quasi-judicial', and that therefore it was within his power to review and set aside the decision of his predecessor. We are unable to concede either the fact or the power asserted to be dependent upon it. *There must be a point at which discretion is exhausted. The procedure for advertising for bids for supplies or services to the government would else be a mockery.* . . . By it the government is given the benefit of competition in the market and each bidder is given a chance for a bargain. It is a provision, therefore, in the interest of both government and bidder, necessarily giving rights to both and placing obligation on both. And it is not out of place to say that the government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own (P. 318)

"*And we repeat there must be some point at which discretion ceases and obligation takes place.* That point is defined in the Garfielde case and that the definition is applicable to the case at bar is illustrated by the findings of the Court of Claims. (P. 319)

"Upon the invitation, in accordance with law . . . the Envelope Company and 11 others submitted bids. The Envelope Company was the lowest bidder, and after the company had been found upon investigation to be financially responsible its bid was accepted by entry of a formal order. . . . Postmaster General Gary went out of office and his successor either by inducement or upon his own resolution entered into a contract with other companies.

"The record furnishes no justification for such action. . . . A great deal is made" (of the fact that subsequent investigation produced a report unfavorable to the financial standing of the company) "and of the fact that the contract was not signed nor the bond of the Envelope Company approved.

> "It makes no difference that the contract was not formally signed or the bond formally approved. . . . Their formal execution, as we have seen, was not essential to the consummation of the contract. *That* was accomplished, as decided in the Garfielde case, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it." (P. 320; stresses and parenthetical matter supplied)

The case of petitioner is identical with the *Purcelle* case with respect to the attempted rescission after acceptance of a bid and entry of the acceptance in the official records. In two other particulars, it is admitted it differs. One of these is favorable to petitioner—the fact that the bond was admittedly not questioned by the government. The other concerns the question as to the manifestation of assent or communication of acceptance which was not in the *Purcelle* case. With respect to the latter point, petitioner urges that the manifestation of assent by the Maritime Commission was so clear and so clearly recorded that *no denial could be made—nor was any denial made*—when the petitioner alleged in the complaint that the bid had been accepted by the Commission and the award of the vessels had been made. *Of course, the Commission could not deny what was spread imperishably and indelibly on its minutes. It was manifest that the bid had been accepted.*

With respect to the procedure of making awards and consummating contracts in competitive bidding, the authority of the *Purcelle* case seems to be definite, clear and completely applicable to the petitioner's case. Bids were opened on October 24 and November 14, 1947 (R. 19). They were studied until January 22, 1948. The Commission had reserved the right to accept or reject. The bids were on forms required by the Commission and were supported, as required by the Commission, by bond of more than $1,000,000. The bidder, under the terms and conditions of the Commission, could not retract his bid and became obligated to perform under bond from the time of the opening

of the bids. The Commission had no limit on the period it could deliberate, and, having deliberated, had the right to reject bids if they were found not satisfactory for any reason. But the Commission, having deliberated, did not avail itself of its alternative and reject the bids on January 22, 1948. It accepted them. At that instant, if the words of the *Purcelle* case and the doctrine of fairness in the process of collective bidding mean anything at all, the government agency had exhausted its period of discretion. At that moment the period of obligation—which had been running for the bidder from the day of the opening of the bids—began for the government.

It is submitted that the *Purcelle* case was completely disregarded by the Court of Appeals in the decision of this case.

II.

District Judge Holtzoff's opinion (R. 10), when deciding on the motions, was adopted by the trial court in finally deciding the case. It contained one statement of law germane to the basic question, which petitioner completely accepts. The Court said:

> "In order that a binding contract may come into being, it was necessary that a notice of acceptance either oral or in writing, or telegraphic or telephonic should have been communicated or *should have been attempted to have been communicated to the plaintiff*. . . ." (Emphasis supplied).

If, when the Commission accepted the bids of the petitioner on January 22, 1948 and entered the acceptance in the record, such entry was not notice, it was surely an attempt by the Commission in the only way open to it, to communicate notice. The simultaneous direction to its proper officers to carry out its action of acceptance admits of no other construction.

Without waiving the point that the entry of the acceptance in the public records was notice of the acceptance of

the bids, petitioner urges that the direction given by the Commission to its proper officers was certainly such an attempt to communicate notice as would satisfy the statement of law of the District Court, which was presumably taken into consideration by the affirmance of the Court of Appeals.

III.

The Administrative Procedure Act of 1946, (*supra*) included many functions in the operation of its Section 3, on public information, which were excluded from the operation of other sections of the Act. Section 2(a) of the Administrative Procedure Act (60 Stat. 238; Title 5 U. S. Code, Section 1001(a)) in defining "agency" excluded from the operation of the act the functions of emergency war agencies but excepted from the exclusion (thereby including) the provisions of Section 3 of the Act regarding public information. Thus the functions performed under the Surplus Property Act were excluded from the operation of all sections of the law, *except Section 3.*

The reason for this exception as to public information is best revealed in the words of the Senate Report on the bill, 1945, P. 8, as follows:

> "The public information provisions of Section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, *all administrative operations* should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency 'housekeeping' arrangements may be involved." (Emphasis supplied).

There is no question of either secrecy or internal housekeeping here.

Pursuant to the Act, the Maritime Commission told the public of its procedure with respect to the sale of government-owned vessels in the Federal Register of September 11, 1946, (11 F. R. 177A-594) as follows:

"Sec. 200.23. Division of Large Vessel Sales. . . .

". . . This Division invites applications for purchase of vessels covered by the Merchant Ship Sales Act of 1946 and bids for non-war built vessels sold for operation, scrap or purposes other than operation, *including Navy LST vessels*. . . . Inquiries concerning bids after their opening and award of vessels should be addressed to Chief, Bid Sales Section. . . . Sales are made pursuant to action by the Commission itself upon recommendations of this Division."

In the same issue of the Federal Register (page 177A-598) the Maritime Commission published the fact that its opinions, orders and public records were available for inspection, especially to persons properly and directly concerned therewith.

Petitioner therefore urges that the Court of Appeals erred in failing to consider the provisions of the Administrative Procedure Act, and the fact that the record of the Commission award was available for public inspection, so that the interested public might have information (and therefor notice) of the contents of such records. If this be so, the Court erred in failing to find that under such circumstances there was no need for the formality of a particularized notice "knowingly" given by the Secretary as an element necessary to consummate a contract.

IV.

Petitioner urged in the appellate court that basic considerations of equitable conduct and fair dealing precluded validation of the Commission's purported rescission of its award on January 23, 1948. The majority opinion in the appellate court took no cognizance of any equities. The petitioner contends here, as this Court found in the *Purcelle* case, that "the record furnishes no justification for such action", meaning the rescission.

Here is the only reason supplied for the rescission, from the minutes of the Commission action of January 23, 1948, (R. 77):

> "Commissioner Mellen moved for reconsideration of the action of January 22, 1948, with respect to LST's. The motion was seconded by Commissioner McKeough. "Commissioner Mellen stated that, *following the* Commission's action of January 22, he further discussed with Mr. Hunter the prices bid under PDX 397, 404, 412 and 418." (These were designations of the Invitations to Bid, of which 397 and 404 are pertinent to this case). "He pointed out that the bids in many cases were as much as $10,000 below other bids for LST's in all sections of the country and that offers of $40,000 each had been made for the purchase of LST's for use as non-self propelled barges."

After the above statement and discussion, the Commission voted for reconsideration and then for rescission of the action of January 22.

The sole argument of petitioner to this point is the following question: "Is the reason given one which furnishes justification for the action?"

V.

The point raised here is a question of the acceptability of two types of evidence. Petitioner contends that (1) affidavits, testimony and sworn statements to the effect that the Secretary of the Commission is the only authorized officer to give notification of awards of LST's are valueless in the face of (2) published procedure of the Commission that inquiries as to such awards be sought elsewhere.

VI.

Section 3(a) of the Administrative Procedure Act of 1946 provides:

> "Every agency shall separately state and currently publish in the Federal Register . . . the established places at which and methods whereby, the public may secure information. . . . No person shall in any manner be required to resort to organization or procedure not so published."

The decision of this case requires the petitioner to resort to a procedure involving the notice of award from the Secretary, "knowingly" given, while the established place at which and the method whereby such information should have been obtained was published by the Commission as by inquiry at the Division of Large Vessel Sales.

VII.

The single, sole and whole defense to petitioner's action below was that no contract existed because the award had been rescinded before the petitioner had been "knowingly" notified of the acceptance of the bids by the Secretary of the Commission, as the only authorized officer who could provide such notification, on behalf of the Commission.

Even this defense could not have been raised had the Secretary proceeded in the normal course of events in accordance with the directions of the Commission to carry its action into effect, since the formality of the telegraphic notification was the sole technicality left to consummate the contract, even under a view most favorable to respondents.

Petitioner urged below that two maxims of Equity had application here. One, that "Equity Will Regard That As Done Which Ought To Have Been Done"; the other, that "Equity Looks To The Substance Rather Than To The Form."

With respect to the first maxim, petitioner quoted Story on Equity Jurisprudence (14th Ed. 1918, Sec. 81) as follows:

> "The true meaning of this maxim is, that equity will treat the subject matter as to collateral consequences and incidents as if the final acts contemplated by the parties had been executed exactly as they ought to have been done, not as the parties might have executed them."

With respect to the second maxim, petitioner quoted the same authority (14th Ed. Sec. 88) as follows:

> "The law looks to the agreement of the parties as it appears on the face of the paper itself and the action will stand or fall upon the strength or weakness of the written instrument."

Thus, it is argued, the U. S. Maritime Commission certainly must have intended to accept the bids and to have the petitioner notified in the normal manner when it took its action of January 22 and gave its directions to its staff. The fact that the Secretary failed to carry out his orders does not change the fact of acceptance, as officially recorded.

The bid was made upon a form required to be used by the Maritime Commission, which incorporated by reference all the terms and conditions contained in the invitation and which contained in the words approved by the Maritime Commission the very wording of the offer that was to be made. Petitioner's offer was actually limited to an insertion of words, (1) describing the petitioner as the bidder, (2) specifying the amounts bid for the respective vessels, identifying the latter, (3) a signature to bind the petitioner and (4) an accompanying bond in the amount of more than $1,000,000 to insure performance in accordance with all the terms and conditions.

This was the instrument upon which action was taken by the Maritime Commission. In fact, there was appended to the same a form of acceptance, which could be signed by the Secretary, if he so desired, (R. 69) completing a formal document which was undeniably a contract. He was directed to carry out the acceptance of the Commission. By signing that document he could have carried it out. *He* decided not to.

Under such circumstances, petitioner argues Equity will consider that the officer did as he was instructed to do, in the formality, and that Equity will look to the instrument prepared by the Commission, submitted by the petitioner,

as hereinbefore outlined, as the substance on which action of acceptance was taken on January 22, 1948.

And under such circumstances, petitioner asks, can it be right or fair to permit the Commission, as a party, to take advantage of a failure and neglect of its officer to act as directed to evade the obligation so undertaken?

VIII.

The Court of Appeals opinion says:

> "The United States Maritime Commission voted on January 22, 1948 to award to appellant corporation and to other bidders some of the surplus ships for which they had bid. It directed its 'proper officers' to take 'all actions necessary and proper to carry the action of the Commission . . . into effect.'" (R. 80)

Thereafter the Appellate Court states:

> "Appellant's bids were of course offers. The resolution of January 22 was a decision to accept some of them. But acceptance of offers involves not only a decision to accept them but a notification to the offeror, and notification, like other legal acts, involves actual or apparent intention. There is no evidence that the Commission or its officers or employees did anything that was or appeared to be intended as a notice to the appellant of the Commission's decision to accept some of its offers." (R. 81).

Petitioner submits that the direction to the officers of the Commission to carry its action into effect and the recording of this direction in its official minutes was, in and of itself, the strongest evidence not only of the intention to accept but of the intention to notify the petitioner of its acceptance. It is submitted that the decision is so self-contradictory as to require correction.

CONCLUSION.

Petitioner therefore believes that the importance of the questions herein raised, the effect of this decision upon the processes of competitive bidding involving the government and the departure of this decision from the established guide supplied by this Court for determining the consummation of contracts resulting therefrom, justifies the prayer for the writ, especially when considered in connection with the provisions of this Court's rule No. 38(5).

Respectfully submitted,

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